Filed 3/12/09 Whitty v. Stone CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FRANK WHITTY, Plaintiff and Appellant, v. KENNETH H. STONE, Defendant and Respondent.	D051768 (Super. Ct. No. GIC847102)

APPEAL from a judgment of the Superior Court of San Diego County, Steven R. Denton, Judge. Affirmed.

In this action for legal malpractice, Frank Whitty, in propria persona, appeals a judgment of dismissal entered after the court granted Kenneth Stone's motion for nonsuit after Whitty's opening statement on the ground his claims required expert opinion and he failed to designate an expert. Whitty contends the nonsuit was improper because Stone's alleged errors and omissions were matters of common knowledge, and thus no expert testimony was required. He also contends the court erred by granting Stone summary adjudication of his complaint's cause of action for fraud. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1989 Frank and Tazu Whitty purchased a home in Poway, California. By 1993 they were in default on their mortgage. They filed several bankruptcy proceedings to avoid foreclosure. In 1996 First Nationwide Mortgage Corporation (First Nationwide) became the successor loan servicer of the mortgage. In 1998 a bankruptcy court ruled the Whittys' lender and assignees had a secured claim for $47,602.33 in arrears on the mortgage. In June 2001 First Nationwide filed a notice of default, and in June 2002 the home was sold at a nonjudicial foreclosure sale.

The Whittys sued First Nationwide for breach of contract and various torts. Their theory was that although they were admittedly in arrears on their mortgage, First Nationwide was at fault for denying them credit for numerous mortgage payments they made through cashier's checks and preventing them from refinancing the property. The Whittys represented themselves initially, but they subsequently hired an attorney who filed third, fourth and fifth amended complaints after First Nationwide's demurrers. In June 2003 the Whittys retained Stone to represent them in the action. Stone filed a sixth amended complaint for wrongful foreclosure and conversion. After a trial in 2004 the jury found in favor of First Nationwide.[1]

---

[1] In the underlying action, the Whittys appealed the trial court's denial of their motion for judgment notwithstanding the verdict. We affirmed the order, explaining: "The Whittys lived in the house for more than 12 years. However, during most of those years, they owed substantial sums on their mortgage and made only intermittent payments. The evidence showed that the Whittys' failure to pay the amounts owed (and the accompanying insurance, taxes and other fees) had nothing to do with First

The Whittys, representing themselves, then commenced this action against Stone. The operative fourth amended complaint (hereafter complaint) included causes of action for negligence, breach of contract, breach of fiduciary duty and fraud.[2]

Stone moved for summary adjudication on the fraud count. The complaint alleged that when Stone began representing the Whittys in the underlying action, he repeatedly assured the Whittys they had a strong case for punitive damages, when Stone actually had no intent of pursuing punitive damages. The Whittys allegedly expected a punitive damages award given First Nationwide's egregious conduct, and had Stone told them "there was a low likelihood of punitive damages," the Whittys would have fired Stone and "searched for an attorney who would do his professional best to have the Whittys awarded punitive damages."

The court granted the motion. It found that Stone's alleged promise to seek punitive damages for the Whittys could support an action for promissory fraud, but Stone presented undisputed evidence he did actively seek an award of punitive damages.

In May 2007 the case proceeded to a jury trial on the breach of contract, negligence and breach of fiduciary duty causes of action, each of which alleged various

---

Nationwide's alleged wrongful conduct. . . . The Whittys sued First Nationwide for wrongful foreclosure despite that they were in default under their loan continuously since 1994 . . . ." (*Whitty v. First Nationwide Mortgage Corporation* (Dec. 11, 2006, D045303) [nonpub. opn.] pp. 31-32.)

[2] The fourth amended complaint included Julia Ramirez, Stone's wife and legal assistant, as a defendant. She was dismissed on demurrer.

errors and omissions by Stone. Tazu Whitty did not appear and the court granted Stone's motion to dismiss her.[3]

The court granted Stone's motion in limine to exclude expert opinion on the applicable standard of care and any breach thereof as Whitty had not designated any expert. The court also granted Stone's motion in limine to exclude opinion testimony on that issue by nonexpert witnesses. The court directed Whitty to present a "comprehensive" opening statement "as to the entirety of the case." Whitty acknowledged he understood the court's direction.

During his opening statement, Whitty complained that Stone did not submit various items of evidence, including First Nationwide's second notice of default, which had a $7,000 discrepancy from the first notice of default it sent four days earlier; "nine false claims in the bankruptcy court" that prevented Whitty from refinancing his home with one potential lender; numerous other refinance offers Whitty was pursuing; a note from First Nationwide's attorney to it stating, "Expect a call from Whitty because we wouldn't give a payoff [amount]"; and a 2001 document from "Lenstar" to First Nationwide or its attorney asking if foreclosure was proper since the loan was "only one month behind."

Further, Whitty said Stone improperly moved in limine for the court to "uphold" the bankruptcy court's 1998 ruling that First Nationwide had a secured claim against Whitty for $47,602.33 in arrears on the mortgage, and as a result Stone did not submit

---

[3] The notice of appeal improperly included Tazu Whitty as an appellant, as do the opening and reply briefs.

sufficient proof of Whitty's actual payments on the mortgage and did not establish his damages against First Nationwide. Additionally, Stone allowed his wife to read portions of deposition testimony in a manner Whitty deemed ineffective, and agreed with opposing counsel and the court that Whitty was entitled to surplus funds from the foreclosure sale instead of litigating the exact amount. Whitty also faulted Stone's drafting of jury instructions that indicated Whitty "had unclean hands" and "had done something wrong"; the jury could not award "damages for out-of-state misconduct" by First Nationwide, a Maryland company; and "intent for conversion doesn't mean they intended to steal or convert it," it "just means they intended to take it."

After the opening statement, Stone moved for nonsuit on the ground Whitty had no competent evidence pertaining to the applicable standard of care or any breach by Stone. Stone argued such evidence was required for the breach of contract and breach of fiduciary duty counts, in addition to the negligence count, because they were all based on Stone's alleged errors and omissions. The court granted the motion, explaining that "all of the decisions and all of the assertions of error in conduct and judgment by . . . Stone all fall into the general category of judgmental decisions by an attorney during the course of work on a trial. There is no error or decision or conduct that falls into the category of conduct for which opinion testimony as to the standard of care would not be required."

DISCUSSION

I

Summary Adjudication/Promissory Fraud

A defendant may obtain summary adjudication of a cause of action when he or she shows the plaintiff cannot establish one or more of its elements or there is a complete defense thereto. (Code Civ. Proc., § 437c, subd. (c).) A defendant may rely "on the pleadings, competent declarations, binding judicial admissions contained in the allegations of the plaintiff's complaint, responses or failures to respond to discovery, and the testimony of witnesses at noticed depositions." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1375.) If the defendant meets its prima facie case, the burden shifts to the plaintiff to show the existence of a triable issue of material fact. (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 894.) We review a summary adjudication ruling de novo. (*Id.* at p. 895.)

The elements of fraud are " '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) " 'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.]

[¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." (*Ibid.*)

The fraud cause of action alleged Stone repeatedly assured the Whittys he would pursue punitive damages for them, but he actually did not intend to do so and they relied on his assurances to their detriment by not firing him and hiring other counsel. The cause of action did not allege Stone made such representations before the parties entered into the retainer agreement. The complaint delineates the issues on summary judgment. "A defendant moving for summary judgment need address only the issues raised by the complaint; the defendant cannot bring up new, unpleaded issues in his or her opposing papers." (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4.) In any event, to any extent the allegations could amount to promissory fraud, Stone satisfied his prima facie burden of showing no triable issue of material fact.

Stone produced evidence that the complaint he drafted included a prayer for punitive damages. Further, Stone attempted to settle the case for $5 million when Whitty's claimed out-of-pocket damages were less than $1 million. Additionally, Stone served First National with a notice to produce financial documents at trial, and although the court granted its motion to exclude the evidence, the court ruled the evidence could be discovered if the trial moved to a punitive damages phase, which it did not. In opening statement Stone said First National's conduct was malicious and fraudulent and subject to punitive damages. In closing argument Stone argued for punitive damages based on First National's egregious conduct.

Stone's showing was sufficient to shift the burden of production to Whitty. In his responsive separate statement, Whitty agreed that Stone's evidence was undisputed. Whitty submitted a declaration, but it was silent on the punitive damages issue. Whitty asserts that "[b]y his intentional misconduct, Stone made certain that Whittys could not win an award of punitive damages against [First Nationwide], especially based on the wrongdoing of [its] agent-and-attorney Schloss." Whitty cites to allegations of his fourth amended complaint, but the court properly sustained Stone's objection to that pleading because it is not evidence. Whitty also cites Stone's notice of and motion for summary adjudication and accompanying memorandum of points and authorities, which are also not evidence.

Further, Whitty cites certain exhibits he apparently attached or sought to attach to his third amended complaint. He cites the following exchange from page 27 of the reporter's transcript from the trial in the underlying case, in which it appears the court was considering in limine motions: "MR. STONE: "Yes, . . . your honor, I think what the confusion is on the issue is the *basis of their motion* is that the financial information isn't relevant even if the jury had to consider punitive damages. [¶] THE COURT: Of course it is. Why wouldn't it be relevant?" (Italics added.) That comment and the following comments of opposing counsel show Stone was merely advising the court of a defendant's position in moving to exclude financial evidence.

Whitty also cites page 36 of the trial transcript, in which Stone advised the court he intended to "release Chase" from the case without prejudice and proceed solely against First Nationwide, and Stone did not believe he could prove a case against Chase for

punitive damages because its employees were not "physically involved" in any despicable conduct. Whether Stone's assessment amounted to negligence, of course, is not a matter of common knowledge. Additionally, Whitty cites page 72 of the transcript, in which during voir dire Stone discussed damages with a potential juror but did not mention punitive damages. Voir dire, of course, does not suggest Stone did not seek punitive damages for Whitty at trial. Further, Stone's discussion at pages 973 and 977-978 of the transcript with the court out of the jury's presence regarding the special verdict form and in response to the court's comment "I don't think this is a punitive damage case," does not help Whitty.

The trial court determined there was no merit to Whitty's argument that Stone merely "pretended" to seek punitive damages when he actually had no such intent. The court explained "the limited admissible evidence submitted by plaintiffs does not demonstrate any evidence of such intent." We agree with that assessment. Summary adjudication of the fraud cause of action was proper.[4]

II

Nonsuit

A

---

4 We note that since the jury found for First National on liability, it never reached the punitive damages issue. Further, as a matter of public policy lost punitive damages in an underlying action are not recoverable as compensatory damages in a legal malpractice action. (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1046-1053.) Accordingly, the punitive damages issue appears irrelevant in this malpractice action. The parties, however, did not address this point.

"A defendant is entitled to nonsuit after the plaintiff's opening statement only if the trial court determines that, as a matter of law, the evidence to be presented is insufficient to permit a jury to find in the plaintiff's favor. [Citations.] When determining whether the plaintiff's evidence is sufficient, the court must accept as true all favorable facts asserted in the plaintiff's opening statement, indulge all legitimate inferences from those facts, and disregard all conflicting evidence. [Citation.] We independently review the ruling on a motion for nonsuit, guided by the same rules that govern the trial court. [Citations.] We will not sustain the judgment ' " 'unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubt in favor of the plaintiff a judgment for the defendant is required as a matter of law.' " [Citations.]' " (*Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 1296.)

B

Whitty argues the nonsuit was improper because the errors and omissions he pointed out in his opening statement were within the jury's common knowledge and did not require opinion testimony. We disagree.

"[A]n attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 358, disapproved of on another ground in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851, fn. 14.) "Generally, the creation of the attorney-client relationship imposes upon the lawyer the obligation to represent his [or her] client with ' "such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly

possess and exercise in the performance of the tasks which they undertake." ' [Citations.] The standard is that of members of the profession 'in the same or a similar locality under similar circumstances' [citation]. The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment." (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 809.)

Ordinarily, expert testimony is required to establish an attorney's standard of care and whether he or she breached the standard of care. (*Wright v. Williams, supra,* 47 Cal.App.3d at p. 810; *Wilkinson v. Rives* (1981) 116 Cal.App.3d 641, 647.) Expert testimony is not required when "the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony." (*Wilkinson v. Rives, supra,* at pp. 647-648.) "In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary." (*Goebel v. Lauderdale* (1989) 214 Cal.App.3d 1502, 1508.) In *Goebel v. Lauderdale,* for instance, the court held expert testimony was unnecessary to establish the malpractice of an attorney who failed to perform even perfunctory research and advised his client to violate the law. The court noted " '[t]here is nothing strategic or tactical about ignorance,' " and "as a matter of law, such conduct markedly departs from the skill and diligence attorneys commonly possess." (*Id.* at p. 1509.)

Here, there was no situation akin to that in *Goebel v. Lauderdale.* As the trial court explained: "The criticisms . . . involve the decision as to what evidence to offer to the jury in the underlying case and how essentially to offer that evidence, whether deposition transcripts were read in whole or in part and in what manner they were read

and by whom they were read, what motions in limine should or should not have been addressed to the court and in what manner motions in limine or the results of motions in limine should be used during the course of the proceedings and the cross-examination or the lack of appropriate skill as addressed in the context of attacking an audit that was raised in evidence by a defense witness."

Contrary to Whitty's position, he raised no conduct by Stone so egregious that expert opinion was unnecessary. For instance, Stone may have had a legitimate reason for trying fix Whitty's arrears on his mortgage at $47,602.33 as of a certain date as the bankruptcy court determined. Perhaps he expected First National to show the arrears were greater. Without any explanation, a jury could not reasonably find malpractice.[5] As another example, Whitty complains the jury was instructed it could not assess punitive damages against First National for its conduct out of state, but the jury could consider out-of-state conduct in determining whether its conduct in California was reprehensible

---

[5] In *Whitty v. First Nationwide Mortgage Corporation, supra,* D045303, this court explained that First National claimed the amount the Whittys owed on the loan (the reinstatement figure) as of September 1997 was $106,744.60. Whitty filed an objection to the claim, stating the reinstatement amount was incorrectly calculated. He filed a declaration that claimed the amount he owed on the loan was $47,602.33. Because First Nationwide did not submit an opposition to Whitty's declaration, the bankruptcy court allowed it a secured claim in the amount of $47,602.33. Our opinion explains that at the underlying trial, the Whittys argued the bankruptcy court's 1998 arrearages order setting the amount of $47,602.33 was "res judicata" and thus First Nationwide should not be permitted to relitigate the issue. First Nationwide opposed the motion, arguing the evidence showed the parties agreed to reopen the issue during settlement discussions in August 2000. The court ultimately agreed with the Whittys and instructed the jury with their proposed instruction that the bankruptcy court order was res judicata on the arrearage issue as of a certain date. Again, the propriety of Stone's tactical decision to limit the amount of arrears is not an issue of common knowledge.

and subject to punitive damages. Obviously, without expert opinion a jury would not know whether the instruction was faulty. We need not belabor the point with additional samples.

Additionally, Whitty contends the applicable standard of care may be established through the California Rules of Professional Conduct. Whitty, however, does not cite his lengthy opening statement to show he ever mentioned the rules. Further, he develops no argument and cites no supporting legal authority. "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, p. 769.) Accordingly, where a party provides a brief "without argument, citation of authority or record reference establishing that the points were made below," we may "treat the points as waived, or meritless, and pass them without further consideration." (*Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.) In any event, the Rules of Professional Conduct expressly "do not establish substantive legal duties — they neither create, augment nor diminish any duties. [Citation.] While the rules can be evidence of a breach of fiduciary duty, they do not, standing alone, prove the breach." (*In re Kirsh* (9th Cir. 1992) 973 F.2d 1454, 1461; *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1087.)

Whitty also submits the trial court erred by determining his causes of action for breach of contract and breach of fiduciary duty required expert opinion to establish the standard of care or breach thereof. He asserts those issues were relevant solely to his negligence cause of action. A "breach of fiduciary duty is a species of tort distinct from a

cause of action for professional negligence. [Citations.] The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damages proximately caused by the breach. (*Stanley v. Richmond, supra,* 35 Cal.App.4th at p. 1086.) Expert testimony is required, however, to establish a breach of duty when, as here, "the attorney conduct is a matter beyond common knowledge." (*Id.* at p. 1087.)

The breach of contract cause of action was based on a statement in the retainer agreement that Stone would "work to obtain the best possible recovery for you, but you acknowledge that [I] have not made any guarantees or promises regarding the recovery that will be obtained." As the court noted, the contract claim "inherently requires an assessment of whether he did that [worked to obtain the best possible recovery], and that . . . is inherently a matter of expert opinion. So, therefore, the breach of contract action must also fall." The gravamen of the entire complaint was legal malpractice. As the court noted, each of the counts was essentially the same with the exception of its title. Contrary to Whitty's position, he may not recover for Stone's alleged errors and omissions under a breach of contract or breach of fiduciary duty theory when he is foreclosed from pursuing a malpractice claim based on the identical conduct.

Whitty also asserts he "had subpoenaed six attorney percipient witnesses who were somehow involved in the underlying case." He claims the trial court's exclusion of their testimony on the applicable standard of care deprived him of his constitutional right to a fair trial.

Whitty cites a report he prepared for trial, which listed numerous percipient witnesses. He does not specify which of the witnesses he intended to call. Neither the trial report nor the other documents Whitty cites indicates he had properly subpoenaed any witnesses for trial. At the hearing on Stone's motion in limine to exclude expert witnesses, Whitty argued he did not need an expert because "I have six attorneys subpenaed [*sic*], some hostile witnesses, some eye witnesses." He did not specify who the witnesses were or what he expected their testimony to be. During the later hearing on Stone's motion in limine to exclude nonexpert opinion testimony, Whitty said nothing about percipient witnesses.

Whitty ignores the actual facts pertaining to his subpoenas. On March 29, 2007, he caused six subpoenas to be delivered to a law firm that represented First National in the underlying litigation. They were intended for employees or former employees of First National and the attorneys who handled the case. The firm could not accept service for one of the attorneys, who had become a federal administrative law judge. Three of the persons were out-of-state residents who were not personally served. On April 10 Whitty appeared at the law firm and personally served two attorneys, McGuinn and Kirby. They appeared in court and objected. Whitty agreed that the March 29 round of subpoenas should be quashed because they were invalid. The court excluded Kirby's testimony because he handled an appellate matter and was not a percipient witness to Stone's conduct. As to McGuinn, Whitty points to no offer of proof pertaining to his expected testimony. Under the circumstances, we find no error or abuse of discretion.

DISPOSITION

The judgment is affirmed. Whitty is to pay Stone's costs on appeal.

_____

MCCONNELL, P. J.

WE CONCUR:

_____

HUFFMAN, J.

_____

O'ROURKE, J.